VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)	
	)	
vs.	)	Criminal No. 102888
	)	
LEE BOYD MALVO	)	

RESPONSE TO MOTION FOR APPOINTMENT AND FUNDING OF EXPERTS AND INCORPORATED MEMORANDUM OF LAW

It is abundantly clear following Husske v. Commonwealth, 252 Va. 203 (1996) that upon a showing of particularized need, the defendant is entitled to the appointment of experts. Simply stating that an expert is wanted does not establish that need.

The Commonwealth does not object to the appointment of a DNA expert, a ballistics expert and a fingerprint expert in this case. The Commonwealth does object to allowing the defense to pick its experts, and does object to providing the names under seal. During the week of March 10, 2002 the defense provided a letter sent to the court prior to the last motions hearing describing the private investigators requested. It was the first the Commonwealth knew that evidently the going international rate for private investigators is $70 per hour. The Commonwealth would have objected to that rate.

As to the other experts requested there is no showing of particularized need.

Finally, the Commonwealth requests that any experts who are paid for by the taxpayers, and who will testify for the defense shall provide a written report of his or her findings 30 days before trial. The Commonwealth has already provided to the defense numerous expert reports and will

provide many more under the rule whether the experts testify or not. The oft mentioned "level playing field" should be level at both ends.

Respectfully submitted,

ROBERT F. HORAN, JR.
Commonwealth's Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above Response was mailed, first class to Michael S. Arif, Counsel for Defendant, 8001 Braddock Road, Suite 105, Springfield, VA 22151 and Craig S. Cooley, Counsel for Defendant, 3000 Idlewood Avenue. P.O. Box 7268. Richmond. VA 23221. this 20th day of March, 2003.

ROBERT F. HORAN, JR.
Commonwealth's Attorney

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)	
	)	
vs.	)	Criminal No. 102888
	)	
LEE BOYD MALVO	)	

RESPONSE TO MOTION FOR BILL OF PARTICULARS AS TO COUNTS I AND II AND INCORPORATED MEMORANDUM OF LAW

A bill of particulars is not required if the indictment provides a defendant sufficient notice of the nature and character of the offense charged so he can make his defense, 217 Va. 145 (1976). The capital counts of the indictment here do precisely that they provide that sufficient notice.

As to Count II of the indictment the Commonwealth will prove as the gradation offense the killing of Dean Myers in Prince William County on October 9, 2002 and, depending on the findings, in a motion to suppress the defendant's statements, it may also rely on other murders by this defendant.

Respectfully submitted

ROBERT F. HORAN, JR.
Commonwealth's Attorney

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	)	
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	)	
LEE BOYD MALVO	)	

RESPONSE TO MOTION TO DECLARE JUVENILE DEATH PENALTY UNCONSTITUTIONAL

The law of the land, as presently espoused by the Supreme Court of the United States is that there is no Eighth Amendment bar to capital punishment for juveniles. See Stanford v. Kentucky, 492 U.S. 361 (1989).

The law in this Commonwealth is found in the case of Commonwealth v. Dwayne Allen Wright, 245 Va. 177 (1993). Wright was 17 years of age when his capital murder was committed. At page 181 the Virginia Supreme Court held as follows:

> "Wright concedes that there is no substantive Eighth Amendment bar to executing seventeen (17) year olds. He contends, nonetheless, that the punishment violates society's evolving standards of decency. The Supreme Court rejected this precise contention in Stanford v. Kentucky, 492 U.S. 361 (1989) and, consistent with Stanford, we reject Wright's contention."

The suggestion that the Supreme Court will deal with the juvenile the same way as they dealt with the retarded is speculative to say the least. There are certainly fundamental differences between the retarded and a juvenile of average intelligence.

Respectfully submitted,

ROBERT F. HORAN, JR.
Commonwealth's Attorney

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ROBERT F. HORAN, JR.
Commonwealth's Attorney

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)	
	)	
vs.	)	Criminal No. 102888
	)	
LEE BOYD MALVO	)	

RESPONSE TO MOTION REQUESTING THAT THE COURT ORDER THE CLERK TO PRODUCE A LIST OF PERSONS SELECTED FOR THE JURY PANEL AND A COPY OF THEIR INFORMATION QUESTIONAIRE TO COUNSEL FOR THE DEFENDANT

The Commonwealth opposes and objects to any variance from the provisions of §8.01-353 of the Code of Virginia. The legislature of Virginia, in that code section, specifically sets forth when and the how of making the jury panel available to both counsel. It must be provided at least 48 hours before the trial and the copy shall contain "the name, age, address, occupation and employer of each person on the panel." Significantly there is no provision for providing any questionnaire used by the clerk.

The request for a list of jurors by August 1, 2003 should not be granted. The potential mischief in selecting the pool more than 100 days before trial is incalculable. Who is going to instruct them on what they should or should not be doing in those 100 days? The legislature created a very small window (potentially 48 hours) for good reason. A short cycle makes sense in order to avoid any mischief or misunderstanding. The Commonwealth is perfectly willing to get the list 48 hours before trial, just like we normally do.

Respectfully submitted,

ROBERT F. HORAN, JR.
Commonwealth's Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above Response was mailed, first class to Michael S. Arif, Counsel for Defendant, 8001 Braddock Road, Suite 105, Springfield, VA 22151 and Craig S. Cooley, Counsel for Defendant, 3000 Idlewood Avenue, P.O. Box 7268, Richmond, VA 23221, this 19th day of March, 2003.

ROBERT F. HORAN, JR.
Commonwealth's Attorney

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)	
	)	
v.	)	CRIMINAL No. 102888
	)	Hon. Jane Marum Roush
LEE BOYD MALVO	)	

MEMORANDUM IN SUPPORT OF COMMONWEALTH'S OPPOSITION TO THE INTRODUCTION OF EVIDENCE OF PRISON LIFE IN REBUTTAL OF FUTURE DANGEROUSNESS

Evidence of Prison Life is Not Admissible to Rebut Future Dangerousness

The Supreme Court has consistently held that general evidence of prison life is inadmissible and irrelevant to the issue of future dangerousness. Bell v. Commonwealth, 264 Va. 172 (2002); Burns v. Commonwealth, 261 Va. 307 (2001); Cherrix v. Commonwealth, 257 Va. 292 (1999). Evidence of prison conditions has also been rejected as irrelevant to the issue of mitigation. Walker v. Commonwealth, 258 Va. 54 (1999).

The scope of the inquiry into future dangerousness is confined to evidence concerning the individual defendant and his specific crime. In narrowing the focus in this manner, the Supreme Court has specifically excluded evidence of the general nature and conditions in a maximum security facility, even when offered to rebut future dangerousness. Burns, 261 Va. at 340.

In Burns, the Court balanced the defendant's Constitutional right to present mitigation evidence against the court's prerogative to exclude evidence it deems irrelevant to the issues of defendant's character, prior record or the circumstances of the offense. Burns, 261 Va. at 339. Burns noted that the Supreme Court of the United States has recognized the traditional authority of state courts to rule upon the relevancy of such evidence. Id at 339. Lockett v. Ohio, 438 U.S. 586 (1978).

In concluding that evidence of general prison conditions was irrelevant to the question of future dangerousness, the Court relied upon the language of Va. Code §§ 19.2-264.2 and 264.4(C). The Court noted that the question under the statute was not whether the defendant *could* commit criminal acts of violence in the future but whether he *would*. Therefore, the Court held that evidence of future dangerousness must be limited to the defendant's history, background, and the circumstances of his crime.

The Authority cited by Defendant in Support of the Admissibility of Prison Life Evidence has been Addressed, Distinguished, and Rejected by the Supreme Court of Virginia

The primary authorities relied upon by Defendant in support of his position that general evidence of prison life is admissible are Skipper v. South Carolina, 476 U.S. 1 (1986); Simmons v. South Carolina, 512 U.S. 154 (1994) and Gardner v. Florida, 430 U.S. 349 (1977). However, each of these cases has been held inapposite by the Supreme Court of Virginia. Burns, 261 Va. at 340, Bell, 264 Va. at 200.

Skipper held that a defendant is entitled to introduce, evidence of his good behavior while incarcerated and awaiting trial. Skipper, 476 U.S. at. 4. In explaining the concordance among Skipper and the Virginia cases, the Court in Burns noted the distinction between evidence concerning future dangerousness peculiar to the defendant, and general evidence of prison conditions not tied to the conduct of the defendant. In accordance with Skipper, evidence of the former is admissible in Virginia; while evidence of the latter is not. Burns, 261 Va. at 340.

Simmons merely held that a defendant who is parole ineligible is entitled to an instruction to that effect when future dangerousness is at issue. Simmons, 512 U.S. at 156. The Commonwealth does not dispute the applicability of the holding in Simmons to the instant case. However, Simmons did not address the admissibility of general evidence of prison life and thus the Commonwealth submits Defendant's reliance upon it is misplaced.

Finally, in Gardner the Court held it was improper for the lower court to rely in sentencing, upon information which was not made available to the defense. Gardner, 430 U.S. at 353. While it is indisputable that the holding in Gardner is binding upon the Court in this case, it is simply not applicable to the issue before the Court on Defendant's Motion. There is no contention that the Court, or jury, in this case will sentence the Defendant (assuming he is found guilty) based upon evidence to which the Defendant is not privy.

The Jury's Inquiry into Future Dangerousness is Not Limited to Evidence of the Prison Society

Defendant contends that the only potential of Defendant remaining a continuing threat is in the context of the prison setting. On that basis the Defendant argues he should be entitled to introduce evidence of prison security and conditions to rebut future dangerousness. Defendant's arguments are without merit and contrary to existing law.

First, Defendant's argument ignores the holding in Lovitt v.Commonwealth, 260 Va. 497 (2000); which held that the question of whether a defendant "would commit criminal acts of violence that would constitute a continuing serious threat to society" is *not* restricted to consideration of only prison society. (*See also* Schmitt v. Commonwealth, 262 Va. 127 (2001)). Moreover, the Supreme Court of Virginia has made it abundantly clear that the inquiry with respect to future dangerousness must be focused upon the Defendant's history as opposed to the nature of the prison environment. Burns, 261 Va. at 340; Bell, 264 Va. at 201; Cherrix, 257 Va. at 310.

The Commonwealth Will Not Seek to Introduce General Evidence of Prison Life

The Commonwealth will confine its evidence on the subject of future dangerousness solely to the peculiar conduct, history and behavior of this Defendant both before, and during his incarceration on these charges. It will not introduce general evidence of prison life, nor will it seek to show the incidence of violence or escapes from prisons. Defendant's claim that the

Commonwealth's intention to present evidence of Defendant's escape attempt somehow opens the door for him to introduce general evidence of prison security is erroneous. Burns, 261 Va. at 339. In Cherrix, the Court explicitly rejected the Defendant's proffer of testimony regarding the ability of the prison system to contain him holding such evidence was irrelevant. Cherrix, 257 Va. at 311.

The Transcript of Testimony from the Case of Commonwealth v. Fisher is Illustrative of the Quagmire that would result if General Evidence of Prison Life and Conditions was Admissible in Virginia (Malvo Exhibit A)

In the Course of his testimony, Warden Stanley Young, opined that he was personally aware of three prison killings that had occurred in Virginia during the twelve month period prior to his testimony. According to the Warden, one of these killings involved a group of Satan worshipers who conducted a human sacrifice during one of their religious services. The unfortunate victim in that killing suffered 38 stab wounds to his chest. Tr. 3/15/01, p. 27.

Warden Young also testified regarding a plot that was uncovered at the Wallens Ridge Prison where a group of inmates was plotting to murder a guard. In addition, he agreed that on occasion inmates assault guards as well as other inmates. Tr. 3/15/01, pp. 28, 29.

Warden Young further testified that the last successful escape attempt of which he was aware occurred out of a Level 3 Prison known as Augusta Correctional Center. Tr.3/15/01, p. 26.

The Commonwealth submits that a consideration of the above brief portion of the testimony elicited from Warden Young illustrates the sound reasoning behind the Supreme Court's exclusion of general evidence of prison conditions. Not only was the testimony highly inflammatory, but most significantly it was not tied to the defendant who was on trial in that case. Granted, some of the Warden's testimony could inure to the benefit of a defendant. For instance, a particular jury might decide that prison life seems harsher than the death penalty and sentence the defendant accordingly. On the other hand, a different jury might be struck by the violent nature of prisoners and prison life and decide to impose the death penalty, not based on

the conduct of the defendant, but rather on that of inmates for whose behavior the defendant is surely not responsible.

The admission of general testimony regarding prison life in the instant case would be in direct contravention of the decisions of the Supreme Court which proscribe such testimony, and moreover, would invite the jury to speculate by exposing it to a host of evidence which is entirely irrelevant to the future dangerousness of this Defendant. It is respectfully submitted that the Supreme Court's approach in limiting evidence of future dangerousness to the peculiar history, character and record of the defendant on trial, is both sound and constitutional.

Conclusion

The Supreme Court of Virginia has rejected evidence of prison life and conditions time after time. The decisions of the Supreme Court of Virginia are in accord with those of the Supreme Court of the United States. While the Commonwealth appreciates the duty of diligent trial counsel to preserve arguments already rejected by the Supreme Court of Virginia, the Commonwealth requests the Court to Deny Defendant's Motion to Introduce General Evidence of Prison Life.

Respectfully submitted,

RAYMOND F. MORROGH
Deputy Commonwealth's Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Commonwealth's Opposition to the Introduction of Evidence of Prison Life in Rebuttal of Future Dangerousness was made available and mailed to Michael Arif, Esquire; Craig Cooley, Esquire; Mark Petrovich, Esquire and Thomas Walsh, Esquire, Counsels for the Defendant, this 20th day of March, 2003.

RAYMOND F. MORROGH
Deputy Commonwealth's Attorney